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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ALFRED J. ANTONINI et al., **Plaintiffs and Appellants,** **v.** **CMR MORTGAGE et al.,** **Defendants and Respondents.**	**A120753** **(Alameda County** **Super. Ct. No. HG04176397)**

Appellants Alfred J. Antonini, Alva J. Antonini, and Gelso Investments III, LLC (collectively the Antoninis) filed a complaint against respondents CMR Mortgage LLC, California Mortgage and Realty, Inc., Mines Road LLC, and Henry Park (collectively CMR) alleging CMR breached an agreement to loan them $1,260,000, and improperly foreclosed on certain real property they owned. CMR moved for summary judgment arguing there was no agreement to make a loan, and the Antoninis had waived the right to bring suit based on any alleged foreclosure irregularities. The trial court agreed with CMR's position and granted it summary judgment. Subsequently, the court awarded CMR its attorney fees. The Antoninis now appeal contending the trial court interpreted the relevant documents incorrectly, and the attorney fee award must be reversed. We disagree and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Antoninis owned a parcel of real property located near Livermore. Because portions of it were located in Alameda, Santa Clara and Stanislaus counties, the property was sometimes called the "tri-county" property.

In 1999, the Antoninis approached CMR about obtaining a loan. CMR agreed and in 1999, it loaned the Antoninis $300,000 (the first loan). The loan was secured by two deeds of trust on the tri-county property.

In 2000, the Antoninis sought and obtained an additional $250,000 loan from CMR (the second loan). Again, the loan was secured by deeds of trust on the tri-county property.

CMR believed the Antoninis had defaulted on their loans. It initiated foreclosure proceedings. In May 2001, shortly before the scheduled foreclosure, CMR and the Antoninis executed a forbearance agreement that gave the Antoninis additional time to cure their default. In exchange, the Antoninis acknowledged that they were in default on both their loans, and they agreed to waive any legal claims that they might have against CMR or its affiliates.

The Antoninis were unable to cure their default even with the additional time. CMR again initiated foreclosure proceedings and a subsidiary of CMR purchased the tri-county property at the ensuing sale.

The Antoninis expressed a desire to repurchase the tri-county property. In late 2003, CMR agreed to consider loaning the Antoninis $1,260,000 which would allow the Antoninis to do so. The proposed third loan would be secured by properties owned by the Antoninis in Texas, Oregon, and California, including the tri-county property.

In November 2003, CMR and the Antoninis executed another document. While described as a "Loan Agreement," the language of the agreement made clear CMR had not committed to making the loan, but had only agreed to consider making a loan.

While the proposed third loan was being processed, the Antoninis offered (in a proposed purchase agreement dated November 6, 2003) to purchase the tri-county property for $850,000. CMR accepted.

In June 2004, in connection with the proposed third loan, and, according to appellants, in connection with the closing of the sale of the tri-county property, the Antoninis executed an "indemnity and release agreement" under which the Antoninis agreed to "fully and forever release" CMR and its affiliates "from any and all claims" that might have arisen as the result of the first or second loans or the foreclosures of the associated deeds of trust.

The parties also prepared several other documents in connection with the proposed third loan including a promissory note, a settlement statement, a subordination agreement, a certificate of nonoccupancy, an environmental certificate and indemnity agreement, a grant deed, escrow instructions, and a general guaranty and indemnity agreement.

In June 2004, CMR was advised by certain title companies that they were unwilling to issue title insurance on some of the properties that would be used to secure the third loan. From the record, it appears that title insurers were uncomfortable working with Albert Antonini who was and who had been in prison since May 2001.[1]

In light of this fact, CMR advised the Antoninis that it would not proceed with the proposed third loan. The Antoninis never tendered the $850,000 necessary to complete their purchase of the tri-county property.

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[1] A representative from CMR described the situation in an e-mail as follows: "Major problem. Old Republic title company's people in Houston refuse to insure any transaction involving AJA and said some ugly, untrue things about title fraud." Another e-mail written by a CMR representative to Alva Antonini contained similar concerns: "Is there a title company in Houston that will insure a loan to Al? We have now heard big-ugly from Stewart (indirectly) and a wider rumor. I'm not raking muck."

Based on these facts, the Antoninis filed a complaint against CMR. The first seven counts were premised on the allegation that CMR breached an agreement to loan the Antoninis $1,260,000. Four other causes of action at issue here were premised on the allegation that CMR had committed various misdeeds when foreclosing on the tri-county property.

CMR moved for summary judgment arguing it was entitled to prevail on the first seven causes of action because the November 2003 "Loan Agreement" was not in fact an agreement to make a loan and CMR acted in good faith when it decided not to proceed. CMR argued it was entitled to prevail on the four other causes of action because the Antoninis had waived any possible foreclosure irregularities in the 2001 forbearance agreement and 2004 indemnity and release agreement.

The trial court agreed with both arguments and granted summary judgment to CMR on the causes of actions alleged.

II. DISCUSSION

A. Standard of Review

The Antoninis contend the trial court erred when it granted summary judgment to CMR.

A defendant moving for summary judgment must show either that the plaintiff cannot establish one or more elements of a cause of action or that it has a complete defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant makes such a showing, the burden shifts to the plaintiff to present evidence that shows there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) There is a triable issue if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of plaintiff. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) "All doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment. [Citation.]" (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1049.)

On appeal, we review a summary judgment ruling de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

With this background, we turn to the specific arguments advanced.

B. Whether CMR Breached an Agreement to Make a Loan

The Antoninis contend the trial court erred when it granted summary judgment to CMR on the first seven causes of action they alleged. The parties agree that those causes of action were premised on the allegation that CMR breached an agreement to loan the Antoninis $1,260,000. The trial court ruled there was no breach because CMR had not agreed to make a loan and CMR acted in good faith when it declined to proceed. The Antoninis now contend the trial court erred when it reached that conclusion.

The language of the November 2003 loan agreement was quite specific. It set forth the loan amount, the interest rate, the amortization terms, the fact that there was no prepayment penalty, the loan origination fee, other loan fees, and the fact that there was no broker fee. However, the loan agreement also clearly stated that CMR had not committed to making a loan. As is relevant, it stated:

"This letter shall in no way be deemed an approval of or commitment by Lender to make the Loan. The Loan will be approved by Lender only upon Lender's issuance of a written notice of loan approval to the Borrower ('Loan Approval Notice'), which will constitute Lender's commitment to make the loan on the terms set forth therein. The Loan will be approved by Lender only upon Lender's review and approval in its discretion of all financial information, appraisals, title reports, inspections, third party reports and other relevant documents and information deemed necessary by Lender to evaluate Borrower's loan request."

There is no evidence CMR issued a "Loan Approval Notice" to the Antoninis as is required by the loan agreement. Indeed, the undisputed evidence is after CMR learned that certain title companies were declining to provide title insurance for the properties to

be secured by the loan, CMR declined to go forward with the transaction. Since there was no agreement to make a loan, CMR could not have breached any such agreement.

None of the arguments the Antoninis make convince us the trial court erred. First, the Antoninis contend the trial court violated Civil Code section 1642[2] when it "refused to consider" the various loan closing documents (i.e., the promissory note, grant deed, escrow instructions, settlement instructions, etc.) that they submitted in opposition to the summary judgment motion. According to the Antoninis, those documents demonstrate CMR had committed to making the loan. We reject the first portion of this argument because it is based on a false premise. The court did not refuse to consider the closing documents. Indeed, it specifically mentioned them in its order granting summary judgment.[3] As to the second portion, at most the closing documents represent the documents that would have been used if the transaction had gone forward. However, the transaction did not go forward and there is no evidence any of those documents were given final effect. The Antoninis have not cited any authority that holds the preparation of documents that would be used *if* a loan commitment were made and *if* a loan transaction were to proceed can somehow be transformed into a binding agreement to proceed, particularly where as here, there is express language that states there is no agreement to make a loan.

Next, the Antoninis argue the November 2003 loan agreement contained all of the material terms of the loan and was therefore binding on CMR. However, the primary case the Antoninis cite, *Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103 (*Peterson*), demonstrates the flaw in their argument. In *Peterson,* the

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[2] Civil Code section 1642 states: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

[3] Specifically, the court stated, "Nor does completion of paperwork involved in the loan transaction constitute agreement on the part of CMR to fund the loan."

court stated, "Under the usual principles of lender liability, '[a] loan commitment is not binding on the lender unless it contains all of the material terms of the loan, *and* either the lender's obligation is unconditional or the stated conditions have been satisfied. . . . . The material terms of a loan include the identity of the lender and borrower, the amount of the loan, and the terms for repayment." (*Id.* at p. 115, italics added.) Here, the loan agreement contained the material terms of the loan as defined in *Peterson.* However, the language of the agreement made clear that CMR had not committed to make a loan. *Peterson* is distinguishable.

Next, the Antoninis argue the trial court should not have granted summary judgment because there was a question of fact as to whether CMR violated the implied covenant of good faith and fair dealing when it declined to proceed with the loan. In California as in most jurisdictions, every contract imposes on each party thereto a duty of good faith and fair dealing in its performance and its enforcement. (See *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371.) The Antoninis' argument presumes there was a contract. However, as we have stated, there was no contract between the Antoninis and CMR in which a covenant of good faith and fair dealing could arise. It follows that the court did not erroneously decide any relevant question of fact.[4]

Finally, relying on this court's decision in *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44 (*Storek*), the Antoninis argue whether CMR acted "reasonably" when it declined to proceed with the loan was a question of fact that precluded the summary judgment. In *Storek*, this court ruled when a commercial contract provides that the satisfaction of one of the parties is a condition precedent to that party's performance, the party has the obligation to make the decision reasonably. (*Id.* at pp. 58-

[4] Having reached this conclusion, we need not decide whether the evidence the Antoninis submitted in opposition to the summary judgment motion was sufficient to establish a triable issue of material fact as to good faith.

60.) *Storek* is distinguishable because, as we have stated, there was no contract or agreement that obligated CMR to make a loan under any conditions. Absent a contract, CMR had no obligation to take any action at all.

C. Whether the Antoninis Waived any Foreclosure Irregularities

The parties agree the four remaining causes of action at issue were based on irregularities that allegedly occurred when CMR was foreclosing on its deeds of trust on the tri-county property. The trial court granted summary judgment to CMR on those causes of action reasoning that Antoninis had waived any possible foreclosure irregularities in the 2001 forbearance agreement and 2004 indemnity and release agreement. The Antoninis now contend they did not waive their rights and summary judgment should not have been granted because disputed issues of material fact were present.

We turn first to the June 2004 indemnity and release agreement. It describes the 1999 and 2000 loan transactions between the Antoninis and CMR, the fact that the Antoninis had failed to make the payments required, and that CMR had foreclosed on the tri-county property. It also states that the Antoninis desired to repurchase the tri-county property using a loan from CMR, but that CMR was only willing to enter into negotiations for such a loan if the Antoninis would execute an indemnity and release agreement. The agreement then contains language in paragraph 8 pursuant to which the Antoninis as indemnitors agreed to "fully and forever release [CMR] . . . from any and all claims, demands, obligations, duties, liabilities, damages, expenses, indebtedness, debts, breaches of contract, duty or relationship, acts, omissions, misfeasances, malfeasance, causes of action, sums of money, accounts, compensation, contracts, controversies, promises, damages, costs, losses and remedies therefore, choses in actions, rights of indemnity or liability of any type, kind, nature, description or character whatsoever, whether known or unknown, whether liquidated or unliquidated . . . which [the Antoninis] may now have or heretofore have had against [CMR] by reasons of, arising

out of or based upon: [¶] (i) the 1999 Loan; (ii) the 1999 Deeds of Trust; (iii) the 2000 Loan; (iv) the 2000 Deeds of Trust; (v) the Foreclosure; (vi) any defenses or offsets, whether known or unknown, which [the Antoninis] may have or might have or may later discover to have including without limitation the defenses of waiver, accord and satisfaction, extinction of obligation, usury, statute of limitations, defective recordation of substitutions of trustee, and payment in full of any of the foregoing; or (vii) any fact, matter, transaction or event relating to any of the foregoing, whether known or unknown."

This language is as clear as it is broad. The Antoninis agreed to forever and completely waive and release any claims they might have that arose out of the 1999 or 2000 loans and the foreclosure of the associated deeds of trust. We conclude the trial court correctly ruled the Antoninis had waived the right to make any claim based on any foreclosure irregularities.[5]

The Antoninis contend the trial court should not have granted summary judgment because the 2004 indemnity and release was simply one of the documents that was prepared as part of the proposed third loan. Noting the loan was never completed, the Antoninis argue the release was never intended to be a "stand alone agreement." However, the only evidence the Antoninis submitted to support this theory was a declaration from Alfred J. Antonini and Mr. Antonini *did not* sign the agreement. He was in prison at the time and the agreement was signed by Mr. Antonini's attorney in fact. Noting this, the trial court granted CMR's objection to Mr. Antonini's declaration on this point based on a lack of foundation. "To testify, a witness must have personal knowledge of the subject of the testimony, i.e., 'a present recollection of an impression derived from the exercise of the witness' own senses.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 356;

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[5] Having reached this conclusion, we need not decide whether the Antoninis *also* waived any foreclosure irregularities in the 2001 forbearance agreement.

Evid. Code, § 702, subd. (a); see also Simons, Cal. Evid. Manual (2008-2009) § 3:4, p. 213.) The trial court did not abuse its discretion when it declined to consider appellant's statements concerning a document that he *did not* execute. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Next, the Antoninis argue the release and indemnity agreement was not enforceable because it was not supported by adequate consideration. However, the agreement itself states the consideration for the agreement: CMR's willingness to enter into negotiations about a possible loan. The Antoninis contend that willingness could not constitute adequate consideration because CMR had already agreed to loan them money in the November 2003 loan agreement, and past consideration is insufficient to support an enforceable agreement. (*Passante v. McWilliam* (1997) 53 Cal.App.4th 1240, 1247.) As we have stated, CMR did not in fact agree to loan the Antoninis money in November 2003. It simply agreed to consider making a loan. CMR's willingness in June 2004 to continue negotiating about a possible loan constituted adequate consideration for the indemnity and release.

Finally, the Antoninis argue that the release and indemnity was not enforceable because it contained several extraneous clauses and it was clearly only a draft.[6] It is true that document was prepared sloppily and it contains language that should have been edited out. However, it is also true the agreement was signed and dated by the Antoninis (or their representative) and CMR. The Antoninis have not cited any authority that holds an otherwise valid and signed document must be considered to be an unenforceable draft simply because it contains extraneous language such as that present here.

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[6] For example, one clause states: "HENRY – WHAT IS THIS PLACEHOLDER IN REFERENCE TO?" Another states: "HENRY – WERE BOTH FORECLOSED?" Yet another states: "HENRY – HOW WAS THE PROPERTY ACQUIRED? THROUGH CREDIT BID?"

We conclude the trial court properly granted CMR summary judgment on the remaining causes of action the Antoninis alleged.

D. Attorney Fees

The Antoninis contend if the summary judgment is reversed, than the attorney fee award must also be reversed.

Since we conclude the trial court properly granted summary judgment, there is no reason to question the attorney fee award.

III. DISPOSITION

The judgment and award of attorney fees is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.